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Witness Statements must be served on time – or automatic sanctions bite

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Rebecca Taylor, member of St John's Chambers' Construction & Engineering and Personal Injury Teams looks at how witness statements must be served on time.



Just before Easter, the Court of Appeal gave its reasons in the latest of a line of cases concerned with the new, more stringent approach to compliance with Court orders and procedural rules.

In *Chartwell Estate Agents Ltd v Fergies Properties SA & Anor* [2014] EWCA Civ 506 (16 April 2014) an order had been made for exchange of witness statements. The directed date in November 2013 passed without either side seeking an extension. Subsequently, in late January 2014, Chartwell made an application for an extension of time to a date in February.

The Court of Appeal held that CPR 32.10 provided an automatic sanction where a party did not serve a statement in time.

This means that the guidance in the footnote to the 2014 White Book at 32.10.2 is unreliable.

Firstly, the footnote suggests that a retrospective application to extend time for service may not need to be made under CPR 3.9 since the sanction does not take effect until trial – and so at the time of the application there is no sanction in force. The Court of Appeal expressly disapproved that footnote.

Secondly, the footnote suggests that where a witness statement is served after the specified date, it would be unjust to exclude the party from adducing the evidence at trial "save in very rare circumstances". The Court of Appeal cast doubt on that footnote, on the basis that it may state the position too broadly and may pay insufficient regard to the more rigorous approach required in relation to non compliance, albeit that the examples given in the footnote (deliberate flouting of court orders or adjournment of the trial) were most certainly circumstances to be taken into account when deciding whether permission would be given.

The position is now absolutely clear – if a witness statement for use at trial is not served on time, then a CPR 3.9 relief from sanctions application will be necessary in order for that witness to be called at trial. No doubt the footnotes will be amended in the Second Supplement.

Given the very real risk that relief will not be granted, the message is a simple one. Either make sure that your witness statements are served on the other party on time, or make a formal application for an extension well before the date passes.

Or as Lord Justice Davis put it –

"With the possibilities afforded by the new CPR 3.9, and when the stakes can be so high, satellite litigation such as has occurred here is therefore perhaps not wholly surprising: albeit most unfortunate. But the one sure way to circumvent such satellite litigation is for parties to comply precisely with rules, practice directions and orders: and, where that really is not capable of being done, to seek from the court the necessary extension of time and relief from sanction at the earliest moment."

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